Supreme Court, U. S.
FILED
MAR 22 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977-78

NO. 77-1339

MICHAEL ROBINSON,
Petitioner,

v.

CITY OF BIRMINGHAM,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE ALABAMA COURT
OF CRIMINAL APPEALS

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The Petitioner respectfully prays that a Writ of Certiorari issue to review the opinions and judgments of the Alabama Court of Criminal Appeals entered in the above cases on October 4, 1977.

OPINION BELOW

The opinions of the Alabama Court of Criminal Appeals are appended hereto as Appendix A and C. The denial of a Petition for Writ of Certiorari by the Supreme Court of Alabama in each case is attached hereto as Appendix B and D (*Robinson v. City of Birmingham*, 353 So. 2d 528 [Ala. Cr. App. 1977]; *Robinson v. City of Birmingham*, 353 So. 2d 534 [Ala. Cr. App. 1977]; *Robinson v. City of Birmingham*, 353 So. 2d 534 [Ala. 1977]; *Robinson v. City of Birmingham*, 353 So. 2d 535 [Ala. 1977]).

JURISDICTION

The Judgments of the Alabama Court of Criminal Appeals were entered on October 4, 1977 (Appendix A, C). Rehearings were denied by the Alabama Court of Criminal Appeals on November 15, 1977 (Appendix A, C). The Supreme Court of Alabama denied certiorari on December 22, 1977 (Appendix B, D). This Court's jurisdiction is invoked under Title 28 U.S.C. §1257 (3) (Appendix E).

QUESTIONS PRESENTED

1. Whether the provisions of City of Birmingham Ordinance 74-18, on their face and as applied, which authorizes a judicial officer authorized to issue a warrant, to issue a warrant for the seizure of a motion picture and a warrant for the arrest of the person or persons accused of publicly exhibiting the same, without first viewing such motion picture to determine if there is probable cause to believe such motion picture film is obscene, deprive Petitioner of his liberty and property in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States.

2. Whether a judicial officer authorized to issue warrants can issue a constitutionally valid warrant for the seizure of a motion picture and a warrant for the arrest of the person or persons accused of publicly exhibiting the same, without first viewing such motion picture to determine if there is probable cause to believe such motion picture film is obscene.

3. Whether the provisions of City of Birmingham Ordinance 74-18, on their face and as applied, which authorize a judicial officer authorized to issue warrants, who has not viewed a film, to issue a warrant for the seizure of said film and a warrant for the arrest of the person or persons accused of publicly exhibiting the same solely upon the conclusory assertions of a single police officer without any inquiry into the factual basis for the officer's conclusions, are vague and impermissibly over-broad and thus repugnant to the First, Fourth, and Fourteenth Amendments to the Constitution of the United States.

4. Whether the procedure under which the warrant issued in this case, solely upon the conclusory assertions of a single police officer, without any inquiry by a neutral, detached magistrate into the factual basis for the officer's conclusions, was not a procedure designed to focus searchingly on the question of obscenity and, therefore, falls short of constitutional requirements demanding necessary sensitivity to freedom of expression.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fourth, and Fourteenth Amendments of the United States Constitution, the pertinent provisions of City of Birmingham Ordinance

74-18, and Title 28, U.S.C. §1257(3), appear in Appendix E hereto (U. S. Const. Amends. 1, 4, 14; City of Birmingham Ordinance 74-18).

STATEMENT

1. The Petitioner was charged in two cases with violation of the obscenity ordinance of the City of Birmingham. In each case, the Petitioner was found guilty. In one case, Petitioner was sentenced to pay a fine of $300.00 and perform hard labor for the City of Birmingham for 180 days. In the other case, he was sentenced to pay a fine of $150.00 and perform hard labor for the City of Birmingham for 90 days. In each case, the fine was assessed by a jury and the hard labor sentence was added by the Court.

In each of the cases, the Complaints alleged that Petitioner herein "... did knowingly unlawfully exhibit an obscene sixteen millimeter color motion picture ... contrary to and in violation of" the City of Birmingham's obscenity ordinance.

2. A Motion to Suppress Evidence was filed in each case and questioned the constitutionality of the procedure adopted by the City of Birmingham to seize *First Amendment* materials. In each case, a judicial officer of the City Court of Birmingham issued a warrant for the seizure of a motion picture film and a warrant for the arrest of the Petitioner who exhibited said film solely upon the conclusory assertions of a single police officer in the form of a written affidavit, without any material inquiry into the factual basis for the officer's conclusions, and without his first having viewed the motion picture film alleged to be obscene to determine if there was

probable cause to believe the film to be obscene. The Motion thus questioned the sufficiency of the underlying affidavit submitted in support of the application for the warrant and whether or not sufficient facts were recited to the issuing Recorder to authorize a finding of probable cause.

In each case, the Motion to Suppress Evidence was overruled, the Petitioner was tried by a jury and found guilty as charged in the Complaints. Sentences imposed by the jury and the Court were suspended pending appeal.

3. The Court of Criminal Appeals affirmed both convictions with opinion on October 4, 1977, and Application for Rehearing was timely filed for each case and denied on November 15, 1977 (Appendix A, C).

4. A Petition for Writ of Certiorari was timely filed in each case with the Supreme Court of Alabama and was denied without opinion on December 22, 1977 (Appendix B, D).

REASONS FOR GRANTING THE WRIT

1. The Petitioner was employed as manager of an adult theatre, which shows exclusively motion picture films X-rated for their sexual content. He was arrested and the motion picture films he was exhibiting were seized pursuant to warrants issued by a Recorder of the City of Birmingham, who had not personally viewed the film, solely upon the conclusory assertions of a single police officer of the City of Birmingham in the form of a written affidavit.

Prior to 1974, City of Birmingham Ordinance 70-5 (1970) *required the Recorder* of its court (a municipal court

judge) *to view* a motion picture film to determine probable cause of its obscenity *prior to* his *issuance* of a search warrant for its seizure. In 1974, Ordinance 70-5 was amended (City of Birmingham Ordinance 74-18) to permit the Recorder or a Magistrate (neither judge nor lawyer) to issue a search warrant for seizure of a motion picture film based upon a written affidavit of a single police officer. The pertinent provisions of Ordinance 74-18 are as follows:

> "Section 2. Search warrants for the seizure as evidence of motion picture films alleged to be obscene as defined herein and to have been exhibited publicly in the City . . . in violation of Ordinance Number 67-2 . . . may be issued by a Recorder or by a Magistrate as hereinafter provided in this ordinance.
>
> 'Section 3. Any police officer of the City . . . who shall accuse any person of publicly exhibiting in the City . . . an obscene motion picture film in violation of said Ordinance No. 67-2 . . . may appear before a Recorder or Magistrate and testify under oath to the facts upon which he bases such accusation, *giving a full description of the conduct depicted in the motion picture taken as a whole.* . . . All such testimony shall be reduced in writing in the form of an affidavit . . . and subscribed and sworn to by the person . . . making the same; . . . the Recorder or Magistrate, if he shall be undecided from the affidavit . . . that such motion picture is obscene may in his discretion view such motion picture if it is then being publicly exhibited in the City . . .
>
> 'Section 4. If such Recorder or Magistrate determines from said affidavit . . . or from his viewing of such motion picture that there is probable cause to believe such motion picture film is obscene, he shall proceed to issue a search warrant for the seizure of said motion picture film and a warrant for the arrest of the person or persons accused of publicly exhibiting the same in the City . . . in violation of said Ordinance No. 67-2, . . . " (Emphasis added.)

The procedure whereby search warrants are issued authorizing the seizure of First Amendment materials must respect the necessary sensitivity to freedom of expression. See *Freedman v. Maryland*, 380 U.S. 51 (1965). Such a procedure is compulsory because of the imminent prospect of censorship and curtailment of expression. "The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Marcus v. Search Warrant*, 367 U.S. 717 (1961).

Search warrants in general cannot be issued upon the mere conclusionary allegations of the affiant. When First Amendment materials are the subject of the warrant, an even greater degree of scrutiny must be applied before that warrant can be issued. *Freedman, supra.* In such a situation, a detached neutral magistrate must himself focus searchingly on the question of obscenity. *Marcus, supra.*

Marcus admonished that the sensitivity of the First Amendment was to be respected and guarded when the question of probable cause was under consideration in the issuance of search warrants for allegedly obscene material.

> "It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedure it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech." *Marcus,* at 731.

The Court in *Marcus* was confronted with the situation wherein search warrants were issued on the strength of the conclusionary assertion of a single police officer, without any scrutiny by the judge of any materials considered by the officers to be obscene. The Court condemned the procedure, holding it to be violative of the Due Process Clause of the Fourteenth Amendment.

In each of these cases involving this Petitioner, there was no viewing by the Recorder of the motion picture prior to the issuance of a warrant upon which the Petitioner's convictions rest. In each case, the Recorder was presented with an affidavit which merely recited that certain sexual conduct had been portrayed in the film. There was no assessment of the film "as a whole." See *Miller v. California,* 413 U.S. 15 (1973). The affidavit in the first case in which Petitioner was tried and convicted reads as follows:

> "... on 20 Mar 1975 at 1200 p affiant viewed a sound and color presentation entitled "Pleasure Cruise" a motion picture. The film showed males and females engaged in actual sexual intercourse, fellatio, cunnilingus, masturbation and homosexual acts. Also presented in the film were scenes of the male organ in an erect state ejaculating openly in or near the mouth of a female actor. These scenes were presented while the actors were on a boat with

> the Cameras focused closely on the genitals of the actors. The scenes were presented as a series of obscene acts that had little or no relation to any plot or story."

Prior to issuing the warrant in this case, the Recorder made no effort to obtain from the officer a "full description of the conduct depicted in the motion picture taken as a whole," as commanded in the City of Birmingham's Ordinance No. 74-18.

> "Q. Did he ask you any detailed questions as to where the acts were, how it happened, when it happened and who was performing them and questions of that nature?
>
> 'A. Specific acts, when a specific act happened in the movie?
>
> Q. Right.
>
> A. No, sir, not that I can remember."
>
> * * * * *
>
> "Q. Did he ask you to depict in detail what the story was about?
>
> A. Do you mean like the plot?
>
> Q. Yes.
>
> A. I don't remember."
>
> * * * * *

"Q. My question to you is, did you and Judge Barnard go into detial as to the complete movie or did you merely just state this movie had acts of sexual intercourse, fellatio, cunnilingus and masturbation.

A. We did not go into detail about the complete movie."

* * * * *

"Q. That is what I am asking, it was your conclusion after viewing the movie, "Pleasure Cruise" that it was obscene?

A. Yes, sir."

In the second case in which the Petitioner was tried and convicted, the affidavit in pertinent part reads as follows:

> ". . . on 10 April 1975 at 12.00 P Affiant viewed a sound and color presentation entitled "Referral Service" a motion picture: This film showed males and females engaged in actual sexual intercourse, fellatio and cunnilingus. Also presented in the film were scenes of the male organ in an erect state ejaculating openly in or near the mouth of a female actor. The film showed a male and female engaged in sexual intercourse on a piano bench. These scenes were presented as a series of obscene acts that had little or no relation to any plot or story. There were scenes presented in this film that had the camera focused closely on the genitals of the actors." (Appendix A at 529, A-2.)

Prior to issuing the warrant, the Recorder made no effort to obtain from the officer a "full description of the conduct depicted in the motion picture *taken as a whole*" as commanded in the City of Birmingham's Ordinance No. 74-18 (See Exhibit D).

> "Q. State to the Court what you told Judge Bernard.
>
> A. I told Judge Bernard that I viewed the movie Referral Service at 305 North 18th Street, Foxy Adult Cinema. I told him I viewed it at approximately the 10th of April, 1975, at around 12.00 at Noon. The movie depicted males and females engaged in sexual conduct including actual sexual intercourse, cunnilingus, fellatio, ejaculation and lewd exhibition of the genitals.
>
> Q. Did you tell him anything else besides that?
>
> A. Nothing other than the fact that Michael Robinson sold me a ticket to the movie and was present when I viewed it."
>
> * * * * *
>
> "Q. In other words, what you told Judge Bernard is what you wrote on this affidavit, is that correct?
>
> A. Yes, sir.
>
> Q. And you did not go into detail scene by scene with Judge Bernard as to what the movie Referral Service contained, did you?

A. No, sir, I didn't go into detail scene by scene. I think I did make reference to a scene involving an act of sexual intercourse on a piano. It had, I believe, a maroon spread over it. I'm not sure about the spread, but I know I did tell him about that scene.

Q. What I'm asking is, other than describing the type of sex acts that were being performed in this movie, you didn't go into detail about what the movie was about, who the characters were and where they were and things of that nature?

A. No, I didn't.

Q. And the Judge didn't ask you questions about the various scenes in the movie and where they were and what took place, when and with whom and however, did he?

A. I don't remember him asking me.

Q. Now, Officer Luker, you have presented affidavits similar to the affidavit that you filed in this case to either Judge Bernard or the various magistrates over in the City Hall previously, have you not?

A. Yes, sir.

Q. And this same procedure of presenting an affidavit describing the type of sexual conduct is generally the procedure that you followed, is that correct?

A. Yes, sir. With some variations.

Q. And in no instance involving Judge Bernard at least, as he is the Magistrate involved here, was there any – ever any detailed description of the movie as a whole, is that not correct, other than the type of sex acts found in the movie?

A. I can't remember offhand.

Q. At least there wasn't in this instance?

A. Not in this instance, no, sir."

From the discussion had in both cases, it is clear that Officer Luker simply recited to the Recorder that he observed certain sexual conduct in each motion picture which he had concluded to be obscene and asked that warrants be issued. There was no inquiry into the nature of each film taken as a whole. Indeed, it is questionable whether there was any inquiry at all. The warrant was simply issued at the officer's request. There was no procedure employed before the seizure "designed to focus searchingly on the question of obscenity."

Seven years after *Marcus*, this Court emphasized that its concern for the procedures used to seize First Amendment materials had not diminished. In *Lee Art Theatre v. Virginia*, 392 U.S. 636 (1968), this Court again emphasized the importance and the fatal consequence of a Magistrate failing to inquire into the factual basis for a single officer's conclusion. Quoting extensively from *Marcus*, this Court reversed the defendant's conviction for the failure of the Magistrate to make the necessary inquiry into the factual basis of the officer's affidavit.

In *Heller v. New York*, 413 U.S. 483(1973), this Court again reiterated its position that the Magistrate must inquire into the factual basis for an officer's conclusion of obscenity. Likewise, in the companion case of *Roaden v. Kentucky*, 413 U.S. 496 (1973), overriding concern was expressed that for a search warrant to issue for seizure of allegedly obscene material, the Magistrate must "focus searchingly on the question of obscenity." Petitioner submits that mere recital in an affidavit of certain sexual acts without further detailed factual information concerning the context and setting within which the activity was performed falls short of constitutional guidelines established in a line of cases in this Court commencing with *Marcus, supra.* Without such information, a magistrate is at a loss to "focus searchingly" on the question of whether police have requisite probable cause. In the absence of detailed information, the magistrate can only rely on conclusions reached by a police officer's conception of obscenity. Where there is no *searching* focus on the question of *obscenity*. requisite probable cause cannot be found for the issuance of a search warrant for First Amendment materials.

In *State v. U&L Theatres, Inc.*, 307 So. 2d 879 (Fla. App. 1975), a sergeant of the Dade County Public Safety Department swore to an affidavit for a search warrant. He described the contents of the film, making general reference to various types of sexual acts. Based upon the affidavit that the sergeant had reason to believe that there was a violation of the Florida obscenity statute, the judge issued a search warrant. The judge further stated therein that he expressly found probable cause for the issuance of that warrant.

The Florida Appellate Court reversed the trial court in its refusal to quash the search warrant. The Appellate Court

stated that from its examination, the record clearly reflected that the search warrant was issued upon a perfunctory examination of an affidavit submitted by a law enforcement officer and that such procedure was not designed to focus searchingly on the issue of obscenity *vel non* of the material in question. The Court found that the warrant was constitutionally insufficient.

In the instant cases, Officer Luker incorrectly determined that the mere presence of sexual activity in a film makes it legally obscene. Under this misconception, Officer Luker composed a "boiler-plate" affidavit in which he listed various sexual acts portrayed and then went to the Recorder for a search warrant. *The limited discussion between Officer Luker and the Recorder centered on the presence of sexual activity, rather than the existence of obscenity as commanded by Marcus. The search warrant was issued solely on the basis of sexual activity, and not on any consideration of obscenity.* Sexual conduct without reference to the setting in which it is portrayed is not synonymous with obscenity.

The Petitioner would respectfully submit that the Recorder's failure to make any substantive inquiry into or to fully assess the motion picture *as a whole*, prior to issuance of a search warrant for the seizure of the film in this case, was violative of the due process clause of the Fourteenth Amendment. In view of this failure, Petitioner further respectfully submits that the search and arrest warrants made a basis of this petition lacked the probable cause needed for *First Amendment* materials and were, therefore, issued in violation of the *Fourth Amendment.*

2. The procedure employed by the City of Birmingham for the issuance of a search warrant for the issuance of a

motion picture film is constitutionally impermissive. The procedure does not focus searchingly on the question of obscenity. The only manner in which the command of *Marcus* can be followed where a full length motion picture is alleged to be obscene is for the Magistrate to view the movie. No other procedure can insure the required constitutional scrutiny of this type of *First Amendment* material.

This Court in *Lee Art Theatre v. Virginia*, 392 U.S. 636 (1968), did not have occasion to reach the issue of a prior viewing. The Petitioner quotes from the text of *Lee Art* to capture the Court's conviction that the procedure for issuing search warrants for *First Amendment* material must respect the sensitivity of the *First Amendment:*

> "It is true that a judge may read a copy of a book in courtroom or chambers, but not as easily arrange to see a motion picture there. However, we need not decide in this case whether the justice of the peace should have viewed the motion picture before issuing the warrant. The procedure under which the warrant issued solely upon the conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions was not a procedure 'designed to focus searchingly on the question of obscenity,' id., at 732, and, therefore, fell short of constitutional requirements demanding necessary sensitivity to freedom of expression." Quoting from *Freedman v. Maryland*, 380 U.S. 51, 58-59. *Lee Art Theatre* at 637.

In *Heller v. New York*, 413 U.S. 483 (1973), the Court considered whether a judicial officer authorized to issue

warrants who had viewed a film and found it to be obscene, could issue a constitutionally valid warrant for the film's seizure as evidence in the prosecution against the exhibitor, without first conducting an adversary hearing on the issue of probable obscenity. The issue of prior viewing was not before the Court because the judge issuing the warrant had viewed the motion picture. The Court, however, made specific reference to the fact that there had been a prior viewing.

> "(The Magistrate) had full opportunity for independent judicial determination of probable cause prior to issuing the warrant, and that he was able to 'focus searchingly' on the question of obscenity'." Quoting from *Marcus v. Search Warrant of Property*, 367 U.S. 317 (1961). *Heller* at 752.

The Court of Criminal Appeals of Oklahoma recently met the issue of prior viewing head-on. The appellate court found error in the failure of a neutral magistrate to view the film prior to the issuance of a constitutionally sufficient search warrant, citing *Heller* as authority for its ruling. There police officers viewed a film and reported what they saw to the District Attorney. The District Attorney prepared an affidavit for a search warrant and the affidavit was presented to a judge who then issued the search warrant. At no time prior to the seizure did the judge view the particular film. The affidavit in support of the search warrant described the contents as containing moving pictures of a male and female engaged in acts of sexual intercourse and oral copulation. The Oklahoma Court said:

> "(the defendants) . . . contend that the trial court erred in overruling the defendants' motion to suppress the introduction of the seized film into

evidence. In support of their contention the defendants argued that no magistrate viewed the film in an effort to focus searchingly upon the question of obscenity prior to the issuance of the warrant and that, therefore, the warrant was issued in violation of the explicit guidelines set down in the recent decision of the United States Supreme Court in *Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745(1973). With this contention we agree. The record reflects that the Judge issuing the search warrant did not view the film prior to the issuance of a warrant. The facts in the instant case do not present exigent circumstances wherein immediate police action must be 'now or never' to preserve evidence. The film complained of was not stolen or contraband and was not in the process of being removed or destroyed. *The failure of a neutral magistrate to view the film prior to the issuance of a consfitutionally sufficient search warrant was error.* See also *Roaden v. Kentucky*, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757." (Emphasis added.) *Hess and Venus Book Mart, Inc. v. State*, 536 P. 2d 366, 368 (Okla. Cr. 1975.)

Petitioner submits that it would only be in exigent circumstances that an exception might be carved to allow a magistrate to issue a search warrant for a motion picture on the basis of a police officer's affidavit. Absent that situation, it is imperative that a neutral detached magistrate view the film prior to issuing a warrant.

To hold otherwise would permit a single police officer inherent powers of censorship and suppression, such as would

constitute a prior restraint on the exercise of Petitioner's *First Amendment* rights.

It is the application of the procedure provided for in City of Birmingham Ordinance No. 74-18 that makes this ordinance impermissibly overbroad and, thus, repugnant to the First Amendment to the Constitution of the United States. It impermissibly delegates to the police officer the responsibility of determining whether presumably protected First Amendment materials are obscene. The police officer becomes the censor. This the Courts have long refused to permit. In *Roaden*, this Court held:

> "The Fourth Amendment proscription against 'unreasonable . . . seizures,' applicable to the States through the Fourteenth Amendment, must not be read in a vacuum. A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material.
>
> * * * * *
>
> "*Marcus v. Search Warrant, supra*, held that a warrant for a seizure of allegedly obscene books could not be issued on the conclusory opinion of a police officer that the books sought to be seized were obscene. Such a warrant lacked the safeguards demanded 'to assure non-obscene material the constitutional protection to which it is entitled . . . (T)he warrants issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene.' 367 U.S., at 731-732. There had been 'no step in the

procedure before seizure designed to focus searchingly on the question of obscenity'." *Id.* at 732.

In addition, this ordinance fails to specify the necessary information to be contained in a police officer's affidavit. The ordinance would permit that such an affidavit recite mere conclusions that a movie is obscene. Again, simply stated, the ordinance does not design a procedure to focus searchingly upon the question of obscenity.

The case at bar exemplifies the errant procedure followed by police officers to obtain search warrants for motion pictures considered to be obscene. The officer views a movie, lists in an affidavit certain sexual acts observed, and thereafter asks that a warrant be issued. The magistrate, in turn, asks briefly if the recitations in the warrant are correct and thereafter issues the warrant. There is no *searching focus* on obscenity, vel non, by the magistrate. The focus, if any, is on the issue of whether the movie depicts sexual conduct.

Petitioner strenuously asserts that sexual conduct in and of itself is not synonymous with obscenity. Obscenity, as this Honorable Court has decreed, involves consideration of:

a. Whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; and,

b. Whether the movie depicts or describes in a patently offensive way sexual conduct specifically defined by the City Ordinance; and,

c. Whether the movie, taken as a whole, lacks serious literary, artistic, political or scientific value. *Miller v. California*, 413 U.S. 15(1973). Material is not obscene simply because it contains discussions or portrayals of sex.

Petitioner respectfully submits that distinguishing the obscene from the non-obscene involves a mixed question of facts and constitutional law. A magistrate cannot rely on the "boiler-plate" affidavit of a police officer to focus searchingly on the question of whether the material, as a whole, appeals to the prurient interest, is patently offensive and lacks serious literary, artistic, political or scientific value. The only procedure to focus on this constitutional question is for the magistrate to view the film himself.

The opinions of the Alabama Court of Criminal Appeals in this cause (Exhibits A-O) were probably inferred by and written after the authors of these opinions had viewed the films involved. The obscenity of the films is not and should not be an issue in this cause. That issue should never have been reached. If the procedure for seizing the films was improper, at least as approved in these cases, the Motion to Suppress should have been granted and the alleged obscenity of the films would not have been determined, at least not at a viewing of the films unlawfully seized.

Petitioner has elected to bring this petition solely on the issue of the unlawful application of the procedural requirements of City of Birmingham Ordinance 74-18, waiving the issues of obscenity *vel non* and unequal enforcement of the city's obscenity ordinance, issues which were also reviewed by the Alabama Court of Criminal Appeals. Petitioner contends that the procedure for seizing a film set

out in Ordinance 74-18 renders the ordinance unconstitutional, either as written or as applied to him, is in conflict with prior decisions of this Court, and negates the necessity for review by this Court of any other issue.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgments and opinions of the Alabama Court of Criminal Appeals.

Respectfully submitted,

Ferris S. Ritchey, Jr., Esquire
Attorney for Petitioner

APPENDIX A

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P.O. Box 351
MONTGOMERY 36101

October 4, 1977

6th Div. 363, *Michael Robinson v. City of Birmingham,* Jefferson Circuit Court.

LEIGH M. CLARK, Supernumerary Circuit Judge.

Appellant was convicted of knowingly and unlawfully exhibiting an obscene motion picture film entitled "Referral Service," which portrayed "Actual act, or acts of sexual intercourse, cunnilingus, fellatio, homosexuality between females, contrary to and in violation of Ordinance No. 67-2, Section 3 of the City of Birmingham, Alabama." A jury fixed his punishment at a fine of $150.00, to which the court added a term of hard labor for ninety days.

The evidence, consisting chiefly of the testimony of one witness, Officer David Luker, shows that appellant was employed by the Foxy Adult Cinema as manager in April 1975. The Foxy is an adult theater which shows exclusively motion picture films X-Rated for their sexual content. The general nature of the films shown in the theater is advertised on the exterior of the building. On April 10, 1975, Officer Luker visited the theater as part of his assignment as a member of the vice squad of the Police Department of Birmingham, to which squad he had been assigned since September, 1974. He paid five dollars for an admission ticket, entered the theater and viewed in its entirety a 16mm motion picture film, in sound and color, entitled "Referral Service."

The viewing time was approximately sixty minutes. During the same time, approximately 12:00 Noon, the film was viewed by between approximately fifteen and thirty male and female patrons.

After viewing the movie, Officer Luker left the theater, went to City Hall, composed a search warrant and an arrest warrant, made an affidavit, and presented himself, the affidavit, and the warrants to Honorable Joseph G. Barnard,[1] who executed the warrants. After appearing before Judge Barnard, narrating an account of his viewing the movie, and responding to questions asked him by Judge Barnard, Luker returned to the theater with the signed warrants on April 12, 1975, watched enough of the movie to ascertain it was the same one he had watched the day before, obtained the film from the projectionist after showing him the search warrant, and then arrested appellant.

The major contention of appellant is that the seizure of the film was an invasion of defendant's rights under the First, Fifth and Fourteenth Amendments to the Constitution of the United States. His premise for such contention is that Judge Barnard did not have sufficient information to warrant the issuance by him of the search warrant. The supporting affidavit in pertinent part is as follows:

> "... on 10 April 1975 at 12:00 PM Affiant viewed a sound and color presentation entitled 'Referral Service' a motion picture: This film showed males and females engaged in actual sexual intercourse, fellatio and cunnilingus. Also presented in the film were scenes of the male organ in an erect state ejaculating openly in or near the mouth of a female actor. The film showed a male and female engaged in sexual intercourse on a piano bench. These scenes

[1] Then a judge of the city of Birmingham – now Circuit Judge Joseph G. Barnard of the Tenth Judicial Circuit.

> were presented as a series of obscene acts that had little or no relation to any plot or story. There were scenes presented in this film that had the camera focused closely on the genitals of the actors."

On the hearing of the motion to suppress, the following testimony was given by Officer Luker, called for the purpose of the motion by defendant:

> "Q. State to the Court what you told Judge Bernard. A. I told Judge Bernard that I viewed the movie Referral Service at 305 North 18th Street, Foxy Adult Cinema. I told him I viewed it at approximately the 10th of April, 1975, at around 12:00 at Noon. The movie depicted males and females engaged in sexual conduct including actual sexual intercourse, cunnilingus, fellatio, ejaculation and lewd exhibition of the genitals.
>
> "Q. Did you tell him anything else besides that? A. Nothing other than the fact that Michael Robinson sold me a ticket to the movie and was present when I viewed it.
>
> "The Court: Is that this Defendant Michael Robinson? A. Yes, sir.
>
> "Q. In other words, what you told Judge Bernard is what you wrote on this affidavit, is that correct? A. Yes, sir.
>
> "Q. And you did not go into detail scene by scene with Judge Bernard as to what the movie Referral Service contained, did you? A. No sir, I didn't go into detail scene by scene. I think I did make reference to a scene involving an act of sexual intercourse on a piano. It had, I believe, a maroon spread over it. I'm not sure about the spread, but I know I did tell him about that scene.

"Q. What I'm asking is, other than describing the type of sex acts that were being performed in this movie, you didn't go into detail about what the movie was about, who the characters were and where they were and things of that nature? A. No, I didn't.

"Q. And the Judge didn't ask you questions about the various scenes in the movie and where they were and what took place, when and with whom and however, did he? A. I don't remember him asking me."

On cross examination of the witness by the City, the witness again narrated what he had seen at the movie and thereafter said:

"Q. And I will ask you if you took these facts and evidence to Judge Bernard at his office at City Hall in Birmingham, Alabama and related them to him and ask you if this is an Exhibit # 1 which has been introduced into evidence, I will ask you if the top portion of this affidavit here was filled out in your own handwriting, is that correct? A. Yes, sir.

"Q. Did you present this to His Honor? A. I did.

"Q. And did you swear to it and sign it in his presence? A. Yes, sir.

"Q. Did he question you at length concerning this affidavit before he signed it? A. No, sir.

"Q. Did he question you about it? A. He questioned me, yes, sir."

[1] A magistrate is required to focus searchingly on the question of obscenity before he issues a search warrant for the seizure of First Amendment material. *Marcus v. Property*

Search Warrant, 367 U.S. 717, 732, 81 S. Ct. 1708, 6 L.Ed.2d 1127 (1961). Condemned especially in *Marcus* is the acceptance by a magistrate of the conclusional statements in the affidavit upon which the warrant is issued.

[2] We do not consider, as appellant apparently does, that the affidavit in this case consists of conclusions merely, or even substantially. They are primarily stark statements of fact. We think also that appellant is not justified in the conclusion that the magistrate did not question the affiant to obtain more information than that which was contained in the affidavit. It is true, as shown above, that the affiant did not remember that the judge questioned him about "the various scenes in the movie and where they were and what took place, when and with whom and however," but it is clear that there was a colloquy between the magistrate and the affiant with reference to what the affiant had viewed in the particular movie. It is also clear, as shown by the affidavit, that "any plot or story" of the movie was not dependent upon, and was unrelated to the pornography that had attracted its patrons at five dollars a person. Whatever the story or the plot, it served merely as an accompaniment, as sublime music, wrested from the sublime verse it usually accompanies, does when applied to a filthy parody; which sometimes has the claimed redeeming quality of humor, although no such quality is even claimed as to the matter under consideration.

We do not doubt that at times it is necessary for a magistrate to proceed further than the examination of the affiant in this case, to preserve the First Amendment rights of persons in possession of material claimed to be obscene. In many cases more details would be necessary, the scheme is more delicately woven, the plan is more subtle, the nauseous scene more camouflaged. In this case, no more artistry is involved than in that of the hit-and-run pervert who scratches his vulgarisms upon the walls of the dirtiest public private places of the world, to vie with the surrounding putrescence from which the normal traveller as soon as possible retreats.

The blatant facts, as shown here, without any further detail, enable the magistrate to make an assessment as a whole of the production, to the extent at least of determining the existence of probable cause for believing it was illegal. The searching focus required is necessarily relative and is dependent upon the object focused upon. In this case, no telescope, no microscope, no spectacles were required.

In arguing for the proposition that the search warrant was invalid, appellant states:

> "It is the appellant's contention that the only manner in which the command of *Marcus* can be followed where a full length motion picture is alleged to be obscene is for the magistrate to view the movie. No other procedure can insure the required Constitutional scrutiny to this type of First Amendment material."

After searching for a case to support appellant, he candidly admits that he has found none, other than *Hess v. State*, 536 P.2d 366 (Okl. Cr. 1975), from which appellant quotes:

> "(the defendants) . . . contend that the trial court erred in overruling the defendant's motion to suppress the introduction of the seized film into evidence. In support of their contention the defendants argued that no magistrate viewed the film in an effort to focus searchingly upon the question of obscenity prior to the issuance of the warrant and that, therefore, the warrant was issued in violation of the explicit guidelines set down in the recent decision of the United States Supreme Court in *Heller v. New York*, 413 U.S. 483, S. Ct. 2789, 37 L.Ed.2d 745 (1973). With this contention we agree. The record reflects that the Judge issuing the search warrant did not view the film prior to the issuance of a warrant. The facts in the instant

> case do not present exigent circumstances wherein immediate police action must be 'now or never' to preserve evidence. The film complained of was not stolen or contraband and was not in the process of being removed or destroyed. The failure of a neutral magistrate to view the film prior to the issuance of a constitutionally sufficient search warrant was error. See also S. Ct. 2796, 37 L.Ed.2d 757."

[3] We do not agree that it was necessary for the magistrate to view the film before he could issue a constitutionally sufficient warrant to authorize seizure. We do not think that *Heller v. New York, supra,* so held. As to the question of any necessity for the magistrate to view the film before issuing a search warrant, the Court in *Heller,* 413 U.S. 488, 93 S. Ct. 2792, said:

> ". . . In *Lee Art Theater v. Virginia,* [392 U.S. 636, 88 S. Ct. 2103, 20 L.Ed.2d 1313] supra, the Court went so far as to suggest that it was an open question whether a judge need 'have viewed the motion picture before issuing the warrant'. . . ."

The Court also noted in *Heller* that "The judge viewed the entire film and, indeed, witnessed the alleged criminal act." The Court did not hold that such viewing by the magistrate was essential to issuance by him of a valid search warrant. Nor did this Court so hold in a case in which the magistrate himself viewed the film before issuing the warrant. *McKinney v. City of Birmingham,* 52 Ala.App. 605, 296 So.2d 197, cert. denied, 292 Ala. 726, 296 So.2d 02, cert. denied, 420 U.S. 950, 95 S. Ct. 1335, 43 L.Ed.2d 429. Noting the fact that the magistrate had seen the film, but not deciding that it was necessary for him to have seen the film, before issuing the warrant, Judge Tyson, now Presiding Judge, speaking for a unanimous Court, said:

> "Finally, we find that, since there was no request or demand by the appellant that the films in question

> be returned to the exhibitor to be shown pending a judicial determination on the issue of obscenity vel non, we find that such were lawfully seized as evidence in the several cases in question inasmuch as here there was a determination by a neutral and detached magistrate on the issue of obscenity prior to their seizure . . . "

We do not say that it is never necessary for the one who issues a warrant of search and seizure to view beforehand the matter seized in order to protect one's First Amendment rights, but to require it in every instance is to say in effect that nothing can be so obscene that no witness can possibly describe it in such a way as to present a probable cause case, when in fact it is so offensive that it may be so described by a witness as to portray its illegality beyond any rational doubt, if not beyond cavil. The protection of First Amendment rights does not require that nothing be believed unless it is seen. Such a requirement is not to be found in any field of knowledge. Furthermore, we suggest a collision between any such requirement in an inordinate desire to protect First Amendment rights and another paramount principle, i.e., the independence, the neutrality and detachment of the judicial branch of government.

A magistrate is primarily a judicial official. Whenever he becomes a witness, or an advocate, a partisan, a detective, a law enforcement officer, his true and proper role is to some extent diluted. The most noteworthy exposition on this subject is to be found in the unanimous opinion of the Supreme Court in *Shadwick v. City of Tampa*, 407 U.S. 345, 92 S. Ct. 2119, 32 L.Ed.2d 783 (1972), wherein Mr. Justice Powell said:

> "An examination of the Court's decisions reveals that the terms 'magistrate' and 'judicial officer' have been used interchangeably . . .

> "To attempt to extract further significance from the above terminology would be both unnecessary and futile. The substance of the Constitution's warrant requirements does not turn on the labeling of the issuing party. The warrant traditionally has represented an independent assurance that a search and arrest will not proceed without probable cause to believe that a crime has been committed and that the person or place named in the warrant is involved in the crime. Thus, the issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search. This Court long has insisted that inferences of probable cause be drawn by 'a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson v. United States*, supra [333 U.S. 10, at 14, 68 S. Ct. 367, at 369, 92 L.Ed. 436, at 440]; *Giordenello v. United States*, supra [357 U.S. 480, at 486, 78 S.Ct. 1245, at 1250, 2 L.Ed.2d 1503, at 1509 . . .
>
> "'. . . Whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement. There has been no showing whatever here of partiality, or affiliation of these clerks [authorized to issue arrest warrants as to misdemeanors] with prosecutors or police. The record shows no connection with any law enforcement activity or authority which would distort the independent judgment the Fourth Amendment requires . . . "

A magistrate should not be placed in a position of having to violate one's Fourth Amendment rights in order to prevent a violation of his First Amendment rights. See also Annot., 32 L.Ed.2d 970.

Defendant's motion to suppress the evidence, consisting of the film "Referral Service," was properly overruled.

[4, 5] Appellant argues, as he contended to some extent, but rather tangentially, on the trial, that there was discrimination by the city of Birmingham in the prosecution of defendant in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. He relies upon *Simonetti v. City of Birmingham*, 55 Ala. App. 163, 314 So.2d 83 (1975) and *Associated Industries of Alabama, Inc. v. State*, 55 Ala. App. 277, 314 So.2d 879, cert. denied, 294 Ala. 281, 314 So.2d 901 (1975), as well as cases from other jurisdictions, including particularly the forerunner, *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). The only evidence to support his contention is the testimony of Officer Luker, who had been with the Vice Squad of the Birmingham Police Department about seven months at the time of his arrest of defendant. Officer Luker testified that during that time the only arrest made by him of a person engaged in showing a full length X-Rated movie, dealing in sex, was defendant, whom he arrested on more than one occasion. The evidence is not altogether satisfactory and definite on the point, which is due to a great extent to a fast-moving interrogation of the witness, but we do not understand that the witness himself viewed any full length illegal X-Rated movies at other movie houses during that time. We do not understand from his testimony that defendant was the only person arrested by any officer of the City for such activity during the stated time. Any decision that there was discrimination against defendant by the city of Birmingham would not be supported by substantial evidence, even though it may be conceded that there are some flimsy indications thereof in the evidence. The evidence does not show that the City selected the Foxy Adult Cinema as an exclusive target of prosecution. The parties agree that a heavy burden rests on a defendant to establish conscious, intentional discrimination requisite to a collision with the Equal Protection Clause of the Fourteenth Amendment. *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944); *Simonetti v. City of Birmingham, supra.*

The ordinance under which appellant was tried and convicted provides in pertinent part:

> "Section 1. The following words and terms, when used in this ordinance, shall for the purpose of this ordinance have the meanings respectively ascribed to them by this section:
>
> "A. 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description of representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, predominant appeal shall be judged with reference to such audience.
> . . ."

In appellant's brief, he states:

> Appellant acknowledges that the City of Birmingham has amended Section 1 of its Ordinance 67–2 to adopt the guidelines set out in *Miller v. California*, 413 U.S. 15 [93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), in its definition of 'obscene'. In so doing it has adopted guidelines which create in its Ordinance an overbreadth that permits them to infringe upon the publication and dissemination of Constitutionally protected materials. The Ordinance containing the *Miller* standards proscribing the exhibition of allegedly obscene materials opens the door for censorship of materials previously found to be entitled to First Amendment protection."

By addressing this argument to us, we assume that appellant is seeking thereby to preserve his right to address it to the Supreme Court of the United States. At any rate, our only course is to attempt to follow, and not to overrule, higher authority. This applies not only to the majority opinion of the Supreme Court of the United States in *Miller v. California, supra,* but also to the majority opinion of the Supreme Court of Alabama in *McKinney v. City of Birmingham,* 292 Ala. 726, 296 So.2d 236, notwithstanding appellant's earnest insistence that we follow dissenting opinions, rather than the opinion of the Court, in the one, and a dissenting opinion,[2] rather than the opinion of the Court, in the other.

[6] The writer of this opinion and the judges of this Court have witnessed a projected view of the film made the basis of the prosecution. To say that its "predominant appeal . . . is to prurient interests, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation" is a gross understatement. Such could have been its *only* appeal to those under no duty to see the picture. It descends to the nadir of repulsiveness.

---

[2] Wherein, notwithstanding the Court's rejection of the position taken therein that the particular ordinance then and now under consideration, as well as Code of Alabama 1940, as amended, Tit. 14, Chs. 64A and 64C, conflicts with the Constitution of Alabama, Art. 1, §4, there is a greatly needed reminder of the enshrinement of liberties in state constitutions, as well as in the Constitution of the United States. The scholarly dissenting opinion of Mr. Justice Jones is a clarion call to a greater recognition of the province of the states, and the responsibility of state courts, in this respect. Lest we forget, state constitutions embraced bills of rights before there was a Constitution of the United States. See also Howard, *State Courts and Constitutional Rights in the Day of the Burger Court,* 62 Virginia Law Review 873.

We find the verdict and judgment amply supported by the evidence and that the record shows no error prejudicial to appellant.

The judgment appealed from should be affirmed.

The foregoing opinion was prepared by the Honorable Leigh M. Clark, a retired Circuit Judge, serving as a judge of this Court under the provisions of §610 of the New Judicial Article (Constitutional Amendment No. 328); his opinion is hereby adopted as that of the Court. The judgment below is hereby AFFIRMED.

All the Judges concur.

APPENDIX B

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1977

Ex parte: Michael Robinson, *Petitioner*

77-158

THE SUPREME COURT OF ALABAMA

December 22, 1977

Certiorari to the Court of Criminal Appeals,
353 So.2d 528

ALMON, Justice.

WRIT DENIED.

TORBERT, C.J. and BLOODWORTH,
FAULKNER and EMBRY, J.J., concur.

APPENDIX C

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P.O. Box 351
MONTGOMERY 36101

October 4, 1977

6th Div. 274, *Michael Robinson v. City of Birmingham,* Jefferson Circuit Court.

HARRIS, Judge.

Appellant was convicted of knowingly and unlawfully exhibiting an obscene motion picture film entitled "Pleasure Cruise," which portrayed, in color and sound, males and females engaged in "actual sexual intercourse, fellatio, cunnilingus, masturbation, and homosexual acts," in violation of Ordinance No. 67-2, Section 3 of the City of Birmingham. A jury in fixing his punishment assessed a fine of $300.00, to which the Court added a term of hard labor for 180 days.

We have today affirmed the conviction of appellant for violating the same ordinance in exhibiting an obscene motion picture film entitled "Referral Service," which case is styled *Michael Robinson v. City of Birmingham,* 6 Div. 363 [Ala. Cr. App., 353 So.2d 528]."

The 6 Div. 363 case was written by Judge Leigh M. Clark, Supernumerary Circuit Judge. If we change the division number, the name of the obscene film, and the punishment meted out to appellant, the issues raised in the present case are identical to those raised and resolved by Judge Clark in 6 Div. 363, Ala. Cr. App., 353 So.2d 528.

We are in complete agreement that the opinion written by Judge Clark in his usual excellent, eloquent, and scholarly manner should be, and hereby is, adopted as the law of the present case. Judge Clark's resourcefulness and style of writing are the despair of emulation, and to attempt to add anything to his opinion would be fruitless and futile. His opinion is classic, exhausting the gifts of rhetoric, and enriches the literature of the law as well as its substance. This case is affirmed on authority of the case written by Judge Clark.

AFFIRMED.

All the Judges concur.

APPENDIX D

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1977

Ex parte: Michael Robinson, *Petitioner*

77–157

THE SUPREME COURT OF ALABAMA

December 22, 1977

Certiorari to the Court of Criminal Appeals
353 So.2d 534

ALMON, Justice
WRIT DENIED.

TORBERT, C.J. and BLOODWORTH, FAULKNER and EMBRY, J.J., conur.

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The pertinent provisions of the First Amendment are:

"Congress shall make no law . . . , abridging the freedom of speech, or of the press . . . "

2. The pertinent provisions of the Fourth Amendment are:

"The right of the people to be secure in their persons, houses, papers, and effects, against reasonable searches and seizures . . . and no Warrants shall issue, but upon probable cause . . . ".

3. The pertinent provisions of the Fourteenth Amendment are:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . "

4. City of Birmingham Ordinance 74–18 provides:

ORDINANCE NO. 74–18

AN ORDINANCE TO FURTHER AMEND ORDINANCE NUMBER 70–5, AS AMENDED BY ORDINANCE NUMBER 73–93, OF THE CITY OF BIRMINGHAM.

BE IT ORDAINED by the Council of the City of Birmingham that Ordinance Number 70–5 be and the same is hereby further amended to read as follows:

"Section 1. The following words and terms, shall when used in this ordinance, have the following respective meanings:

A. *'Obscene Motion Picture'*: A motion picture which to the average person, applying contemporary community standards, the predominant appeal of which motion picture taken as a whole is to prurient interest, that is, a shameful or morbid interest in sexual conduct, nudity or excretion, and depicts or describes in a patently offensive manner sexual conduct, which motion picture taken as a whole lacks serious literary, artistic, political or scientific value.

B. *'Sexual Conduct'*: Any act of masturbation, excretory functions, homosexuality, sado-masochistic abuse, nudity, sexual intercourse or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person be a female, breast, whether such conduct be actual or simulated, and lewd exhibition of the genitals.

C. *'Nudity'*: The showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

D. *'Sado-Masochistic Abuse'*: Flagellation or torture by or upon a person undressed or clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one undressed or so clothed.

E. *'Person'*: Any individual, partnership, firm, association, corporation or other entity.

F. *'Recorder'*: A Recorder of the City of Birmingham regularly assigned to the trial of cases in the Recorder's Court of the City.

Section 2. Search warrants for the seizure as evidence of motion picture films alleged to be obscene as defined herein and to have been exhibited publicly in the City or its police

jurisdiction in violation of Ordinance Number 67–2, or any other ordinance of the City, may be issued by a Recorder or by a Magistrate as hereinafter provided in this ordinance.

Section 3. Any police officer of the City or other individual who shall accuse any person of publicly exhibiting in the City or its police jurisdiction an obscene motion picture film in violation of said Ordinance Number 67–2, or any other ordinance of the City, may appear before a Recorder or Magistrate and testify under oath to the facts upon which he bases such accusation, giving a full description of the conduct depicted in the motion picture taken as a whole. Such police officer or other individual may also offer in evidence before such Recorder or Magistrate exhibits together with the testimony of any other person on any issue relevant to whether or not such motion picture is obscene or whether or not the accused person is guilty of exhibiting it in public. All such testimony shall be reduced to writing in the form of an affidavit or affidavits and subscribed and sworn to by the person or persons making the same; and all exhibits, if any, shall be retained as a part of said affidavit. The Recorder or Magistrate, if he shall be undecided from the affidavit or affidavits and exhibits, if any, that such motion picture is obscene may in his discretion view such motion picture if it is then being publicly exhibited in the City or its police jurisdiction and the Director of Finance of the City shall be authorized hereby to reimburse such Recorder or Magistrate for any cost of admission and transportation incurred in viewing such motion picture.

Section 4. If such Recorder or Magistrate determines from said affidavit or affidavits and exhibits, if any, or from his viewing of such motion picture that there is probable cause to believe such motion picture film is obscene, he shall proceed to issue a search warrant for the seizure of said motion picture film and a warrant for the arrest of the person or persons accused of publicly exhibiting the same in the City or its police jurisdiction, in violation of said Ordinance Number 67-2, or any other ordinance of the City.

Title 28, U.S.C. §1257(3)

§1257. State courts; appeal; certiorari

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

> "...(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Supreme Court, U. S.
FILED
APR 20 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977-78

No. 77-1339

MICHAEL ROBINSON,
Petitioner,

v.

CITY OF BIRMINGHAM,
Respondent.

MOTION TO DENY WRITS OF CERTIORARI TO REVIEW THE OPINIONS AND JUDGMENTS OF THE ALABAMA COURT OF CRIMINAL APPEALS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977-78

No. .....

MICHAEL ROBINSON,
Petitioner,

v.

CITY OF BIRMINGHAM,
Respondent.

MOTION TO DENY WRITS OF CERTIORARI TO REVIEW THE OPINIONS AND JUDGMENTS OF THE ALABAMA COURT OF CRIMINAL APPEALS

The Respondent respectfully prays that Writs of Certiorari be denied to review the opinions and judgments of the Alabama Court of Criminal Appeals entered against the Petitioner in two (2) separate cases on October 4, 1977.

OPINIONS BELOW

The opinions of the Alabama Court of Criminal Appeals which are appended to the Petitioner's Arguments and filed in this Honorable Court marked, Appendix A and C are correct because no reversible error or errors were committed by the trial courts.

JURISDICTION

This Court's jurisdiction *may* be invoked under Title 28 U.S.C.A. § 1257. (Emphasis added)

The following portion of United States Supreme Court Rule 19 is material to the pending cases. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

The issues raised by the Petitioner do *not* in the opinion of the writer present new questions for the first time nor present any special or important reasons for granting writs of certiorari. (Emphasis added) It appears that neither of these cases are cases of first impression and that the following quotation is applicable in view of the fact that no new question is being presented for the first time:

> "A cause which presents a new question for the first time, and for which, consequently, there is no precedent applicable in all respects, is a 'case of first impression.' People v. Pestronk, 157 N.Y.S.2d 492, 493, 3 Misc.2d 845."

QUESTIONS PRESENTED

1. Is Ordinance 74-18 of the City of Birmingham unconstitutional because it makes it optional whether or not the magistrate will personally view the subject matter prior to the issuance of a search warant?

2. Were the search warrants in question conclusionary?

STATEMENT OF THE CASE

1. The Petitioner was charged and convicted in two cases of violating Ordinance No. 76-2, Section 3 of the City of Birmingham, Alabama:

> "It shall be unlawful for any person to knowingly publish, print, exhibit, distribute or have in his possession with intent to distribute, exhibit, sell or offer for sale, in the city or the police jurisdiction thereof, any obscene matter."

In the obscene motion film entitled "Referral Service" the jury assessed a fine of $150.00 and the Court imposed 90 days hard labor to be performed for the City of Birmingham. In the other obscene motion film trial entitled "Pleasure Cruise" resulted in the jury and the Court respectively imposing the *maximum fine and punishment* of $300 fine and 180 days hard labor. (Emphasis added)

2. Motions to Suppress the Evidence filed by the Petitioner were properly overruled.

Motions referred to in this brief and argument will be prefixed by an "M" and transcript of the jury trial by a "T".

REASONS FOR DENYING THE WRITS

1. No new substantial constitutional question is presented.

A. In *Heller v. New York*, 93 S.Ct. 2789 (1973) the Court stated:

> "If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate and following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party the seizure is constitutionally permissible."

This case did *not* mandate that the magistrate view the film. (Emphasis added) Further no demand by Petitioner was made that either of the films be returned to the exhibitor to be shown pending a judicial determination of obscenity vel non. Thus both films were lawfully seized as evidence.

B. The affidavits in the search warrants were *not* conclusory assertions of Officer David Luker, (Emphasis added), and the magistrate did focus searchingly on the issue of obscenity.

C. MARCUS, FREEDMAN, LEE ART, HELLER and ROADEN are cited by the Petitioner, Michael Robinson, alleging that the search warrants were issued based on the conclusory assertion of a police officer and the magistrate did not focus searchingly on the question of obscenity. The factual issues in those citations are not relevant to these pending cases.

The language in Justice Clark's opinion eloquently deals with some of the cases cited by Petitioner and will be embodied in this argument substituting the word Petitioner in place of Appellant which was made part of this record by Petitioner. (The correct citation for *McKinney v. City of Birmingham* is 296 So.2d 202

and not 96 So.2d 02 as cited by Petitioner. A portion of the opinion is hereby embodied.)

"A magistrate is required to focus searchingly on the question of obscenity before he issues a search warrant for the seizure of First Amendment material. *Marcus v. Property Search Warrant*, 367 U.S. 717, 732, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961). Condemned especially in *Marcus* is the acceptance by a magistrate of the conclusional statements in the affidavits upon which the warrant is issued.

We do not consider, as Petitioner apparently does, that the affidavit in this case consists of conclusions merely, or even substantially. They are primarily stark statements of fact. We think also that Petitioner is not justified in the conclusion that the magistrate did not question the affiant to obtain more information than that which was contained in the affidavit. It is true, as shown above, that the affiant did not remember that the judge questioned him about "the various scenes in the movie and where they were and what took place, when and with whom and however," but it is clear that there was a colloquy between the magistrate and the affiant with reference to what the affiant had viewed in the particular movie. It is also clear, as shown by the affidavit, that "any plot or story" of the movie was not dependent upon, and was unrelated to the pornography that had attracted its patrons at five dollars a person. Whatever the story or the plot, it served merely as an accompaniment, as sublime music, wrested from the sublime verse it usually accompanies, does when applied to a filthy parody; which sometimes has the claimed redeemng quality of humor, although no such quality is even claimed as to the matter under consideration.

We do not doubt that at times it is necessary for a magistrate to proceed further than the examination of the affiant in this case, to preserve the First Amendment rights of persons in possession of material claimed to be obscene. In many cases more

details would be necessary, the scheme is more delicately woven, the plan is more subtle, the nauseous scene more camouflaged. In this case, no more artistry is involved than in that of the hit-and-run pervert who scratches his vulgarisms upon the walls of the dirtiest public private places of the world, to vie with the surrounding putrescence from which the normal traveller as soon as possible retreats.

The blatant facts, as shown here, without any further detail enable the magistrate to make an assessment as a whole of the production, to the extent at least of determining the existence of probable cause for believing it was illegal. The searching focus required is necessarily relative and is dependent upon the object focused upon. In this case, no telescope, no microscope, no spectacles were required.

In arguing for the proposition that the search warrant was invalid, appellant states:

> "It is the petitioner's contention that the only manner in which the command of Marcus can be followed where a full length motion picture is alleged to be obscene is for the magistrate to view the movie. No other procedure can insure the required Constitutional scrutiny to this type of First Amendment material."

After searching for a case to support Petitioner, he candidly admits that he has found none, other than *Hess v. State*, 536 P.2d 366 (Okl. Cr. 1975), from which Petitioner quotes:

> "(the defendants) . . . contend that the trial court erred in overruling the defendants' motion to suppress the introduction of the seized film into evidence. In support of their contention the defendants argued that no magistrate viewed the film in an effort to focus searchingly upon the question of obscenity prior to the issuance of the warrant and that, therefore, the warrant was issued

> in violation of the explicit guidelines set down in the recent decision of the United States Supreme Court in *Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed. 2d 745 (1973). With this contention we agree. The record reflects that the Judge issuing the search warrant did not view the film prior to the issuance of a warrant. The facts in the instant case do not present exigent circumstances wherein immediate police action must be 'now or never' to preserve evidence. The film complained of was not stolen or contraband and was not in the process of being removed or destroyed. The failure of a neutral magistrate to view the film prior to the issuance of a constitutionally sufficient search warrant was error. See also S.Ct. 2796, 37 L.Ed.2d 757."

[3] We do not agree that it was necessary for the magistrate to view the film before he could issue a constitutionally sufficient warrant to authorize seizure. We do not think that *Heller v. New York*, supra, so held. As to the question of any necessity for the magistrate to view the film before issuing a search warrant, the Court in *Heller*, 413 U.S. 488, 93 S.Ct. 2792, said:

> ". . . In Lee Art Theater v. Virginia [392 U.S. 636, 88 S.Ct. 2103, 20 L.Ed.2d 1313], supra, the Court went so far as to suggest that it was an open question whether a judge need 'have viewed the motion picture before issuing the warrant' . . ."

The Court also noted in *Heller* that "The judge viewed the entire film and, indeed, witnessed the alleged criminal act." The Court did not hold that such viewing by the magistrate was essential to issuance by him of a valid search warrant. Nor did this Court so hold in a case in which the magistrate himself viewed the film before issuing the warrant. *McKinney v. City of Birmingham*, 52 Ala. App. 605, 296 So.2d 197, cert. denied, 292 Ala. 726, 296 So.2d 202, cert. denied, 420 U.S.

950, 95 S.Ct. 1335, 43 L.Ed.2d 429. Noting the fact that the magistrate had seen the film, but not deciding that it was necessary for him to have seen the film, before issuing the warrant, Judge Tyson, now Presiding Judge, speaking for a unanimous Court, said:

> "Finally, we find that, since there was no request or demand by the appellant that the films in question be returned to the exhibitor to be shown pending a judicial determination on the issue of obscenity vel non, we find that such were lawfully seized as evidence in the several cases in question inasmuch as here there was a determination by a neutral and detached magistrate on the issue of obscenity prior to their seizure . . ."

We do not say that it is never necessary for the one who issues a warrant of search and seizure to view before hand the matter seized in order to protect one's First Amendment rights, but to require it in every instance is to say in effect that nothing can be so obscene that no witness can possibly describe it in such a way as to present a probable cause case, when in fact it is so offensive that it may be so described by a witness as to portray its illegality beyond any rational doubt, if not beyond cavil. The protection of First Amendment rights does not require that nothing be believed unless it is seen. Such a requirement is not to be found in any field of knowledge. Furthermore, we suggest a collision between any such requirement in an inordinate desire to protect First Amendment rights and another paramount principle, i.e., the independence, the neutrality and detachment of the judicial branch of government.

In *Freedman v. State of Maryland*, 85 S.Ct. 734, Appellant sought to challenge the constitutionality of the Maryland motion picture censorship statute.

There existed no statutory provision for judicial participation in the procedure which barred a film, nor assurance of a prompt judicial review. This resulted in an invalid prior restraint.

In substance *Freedman's* argument was that, the apparatus operated in a statutory context in which judicial review may be too little and too late, the Maryland statute lacks sufficient safeguards for confining the censor's action to judicially determined constitutional limits, and therefore contained the same vice as a statute delegating excessive administrative discretion. No censorship statutes are involved in either of the two (2) cases presented. (Emphasis added)

Michael Robinson contends that the rule of laws as set forth in *Roaden v. Kentucky* (1973), 93 S.Ct. 2796, was not complied within the present case. In *Roaden* the Sheriff seized a film without a search warrant and the seizure was prior to a magistrate having an opportunity to "focus searchingly on the question of obscenity." In the case before this Court the contrary was true. The Judge focused searchingly on the question of obscenity and then issued the search warrant on film entitled, "Referral Service" (T. pages 36, 37 and 40) and "Pleasure Cruise" (M. pages 38 and 39).

The City of Birmingham further refutes the Petitioner's arguments and suggests that the *common thread* in all the cases which he cites were in the nature of the material seized and the manner in which they were taken by an officer without the authority of a constitutionally sufficient warrant, thereby constituting prior restraint. ***No prior restraint exists in these cases against Michael Robinson.*** (Emphasis added)

In the 6th Division 363, "Referral Service" Officer Luker testified in the transcript (T. pages 38 and 39) as to the length of the colloquy which took place between him and Judge Barnard.

> " 'Q. Officer Luker, approximately how long did—approximately what time was it that you went in to see Judge Barnard on the 11th of April prior to his executing this search warrant and arrest warrant?

'A. I don't remember, but in my best judgment it was more than likely right after his morning recess.

'Q. And how long were you with him approximately?

'A. Again, I don't remember the specific time for sure, but I would imagine no longer than 20 minutes.

'Q. Ten to 15 minutes be more accurate or do you think it was as much as 20 minutes?

'A. I would say between 10 and 20, no more than 20.

'Q. At that time did you state in detail what you saw in the movie Referral Service to Judge Barnard?

'A. Yes, sir.' "

In the 6th Division 274 "Pleasure Cruise" Officer Luker testified in the Motion (M. pages 38 and 39) as to the colloquy which took place between he and the magistrate and also the time element involved.

"Q. All right, sir, did you make an affidavit to him before he executed this search warrant—arrest warrant?

A. Yes, sir.

Q. Did he sign it in your presence?

A. Yes, sir.

Q. Do you recognize his signature?

A. Yes, sir.

Q. All right, sir, I show you Defendant's Exhibit 1, which is the search warrant and ask you to look at that. See if you recognize that instrument?

A. Yes, sir.

Q. All right, sir, who filled out that instrument on the front end or the back?

A. I did.

Q. All right, sir, and then what did you do next with that instrument?

A. Presented it to Judge Barnard.

Q. When you presented it to Judge Barnard, what, if anything, did you do at that time?

A. I swore to the affidavit and signed my name on the affidavit.

Q. All right, sir, and did he also sign his name in your presence?

A. Yes, sir.

Q. All right, about how long did the conversation take place between you and Judge Barnard at that time?

A. I would say not more than fifteen minutes.

Q. Did he question you at any time concerning the contents of this affidavit?

A. Yes, sir.

Q. Do you recall what, if anything, he asked you about this?

A. I recall a couple of the questions. He asked me was there actual intercourse; could I see clear penetration; were things I alleged actually happening in the film and could it be seen clearly.

Q. Did he read this entire exhibit, front and the back of Defendant's Exhibit 1 before he asked you these questions?

A. Yes, sir, it looked like it to me he read it.

Q. I notice on this exhibit, evidence, being introduced Defendant's Exhibit 1 that you said these acts took place on a boat, did you relate that to the magistrate at that time?

A. I don't remember saying that to him, no sir.

Q. But you could have, is that correct?

A. Yes, sir, I could have. It's in the warrant."

The search warrant (Re: Pleasure Cruise) was introduced into evidence in the Circuit Court and is set forth as part of the record (T. pages 163 and 164). It also contained detailed factual information which enabled the magistrate in this case to focus searchingly on the question whether or not there existed probable cause to believe the film to be obscene thus satisfying the requirements of Birmingham City Ordinance No. 74-18 (T. pages 172-174). A receipt for the seizure of the film was given to Michael Robinson (T. page 164).

Nowhere in *Officer Luker's affidavits* in his search warrants are there any reference *generally* to *"various types of sex acts." He is specific.* Further taking the colloquies together with the affidavits in the search warrants it is evident the procedures used were designed and did focus searchingly on the issues of the obscenity vel non of the materials in question. (Emphasis added).

State v. U & L Theatres Inc., 307 So.2d 879, cited by the Petitioner appears to be inapplicable because the facts are not the same and further there is no allegation nor proof that the films seized constituted the only available copies.

It is immaterial that Birmingham City Ordinance 70-5 passed in 1970 required the Recorder's Court judge to view a motion picture film to determine probable cause of its obscenity prior to his issuance of a search warrant for its seizure. This was before *Heller v. New York*, 93 S.Ct. 2789 (1973). Ordinance No. 70-5 was changed after this ruling by Birmingham City Ordinance 74-18. At the time of the issuance of these two (2) search warrants in question viewing was optional with the magistrate.

The affidavit in the search warrant introduced into evidence and before this Honorable Court pertaining to the film "Pleasure Cruise" (T. page 163) was sufficient to support it and was *not* "boiler plate" as alleged by Michael Robinson. (Emphasis added) In addition, facts were related to Judge Joseph G. Barnard by Officer Luker. A colloquy took place between these individuals with specific details regarding the sex acts, (M. pages 38-40). The Judge focused searchingly on the issue of obscenity.

It is not necessary all the evidence before the magistrate be stated in the affidavit. *Brandies v. State*, 44 Ala. App. 648, 219 So.2d 404.

On page 17 of his petition, Michael Robinson refers to an Oklahoma case without citing it in accordance with accepted citation procedures. No book nor page number is given. Further the date of the decision is not cited, therefore it should not be considered by this Honorable Court. If it is so considered, the Respondent points out that the facts are different. The affidavit in the search warrant was made by a District Attorney based on hearsay (information given to said District Attorney by police officers who had viewed the film). The facts in both cases are that Officer Luker viewed both films and related them directly to Judge Barnard.

It is obvious that the police officers do not determine whether or not probable cause exists. This is determined by the magistrate or judge to whom it is presented. The issuance of the warrant by the magistrate or judge certainly does not make the person making the affidavit a censor. On page 20 the Petitioner alleges basically that there was only a brief colloquy between the magistrate and the officers. This is refuted by the testimony in the record. In "Referral Service" no more than 20 minutes and in "Pleasure Cruise" no more than 15 minutes.

Page 21 of the Petitioner's argument, paragraph 1(c) apparently is an erroneous citation made because the third test under *Miller* does *not* include—(Material is not obscene simply because it contains discussions on portrayals of sex). (Emphasis added)

Michael Robinson apparently criticizes the Alabama Court of Criminal Appeals for viewing the films by stating the obscenity of the films is not and should not be an issue in this cause. Yet in *Miller v. California*, 93 S.Ct. 2607 at page 2756 citing Mr. Justice Harlan's opinion in *Roth*, he stated:

> "I do not understand how the Court can resolve the constitutional problems now before it without making its own indepedent judgment upon the character of the material upon which these convictions were based." (354 U.S., at 498, 77 S.Ct., at 1316.)

Not only did the juries render their independent judgments upon the character of the materials involved in these cases but the Alabama Court of Criminal Appeals also made its own independent judgment. The fact the Petitioner wants to avoid the issue of obscenity is immaterial.

Petitioner's brief, Appendix A (A.1-A.16) contains the excellent, eloquent and scholarly opinion written by Judge Clark in reference to the obscene motion picture film entitled "Referral Service" in which he affirmed the judgment and/or conviction appealed from. Justice Harris adopted as the law in the obscene motion picture film entitled "Pleasure Cruise" the opinion written by Judge Clark and affirmed the conviction also.

CONCLUSION

For the foregoing reasons, Writs of Certiorari should be denied to review the opinions and judgments of the Alabama Court of Criminal Appeals.

Respectfully submitted,

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